85-415 (1)

No. _____

Supreme Court, U.S.
FILED
SEP 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN N. PERRUZZA,

Appellant,

vs.

COUNTY OF LOS ANGELES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

JOHN N. PERRUZZA
Attorney at Law
22395 Cass Avenue
Woodland Hills, California 91364
(818) 901-3666

Attorney In Pro Se

MPP

Lorraine Mitchell - Legal Briefs
732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021
TELEPHONE: (213) 747-5631

CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTIONS PRESENTED

1. Whether administrative decisions obtained by opposing counsel and parties through unethical ex parte means have any standing in a court of law?

2. Do the aforesaid counsel and parties have any standing in a court of law to litigate these unethical ex parte administrative decisions?

3. Is the deprivation of procedural due process through unethical ex parte rulings obtained from a biased and prejudiced administrative board actionable by the injured party for violation of his civil rights?

4. Is an individual's exercise of his right to seek redress from civil wrongs through administrative and judicial procedures constitutionally protected against retaliation under the first amendment and civil rights legislation?

5. Do acts of retaliation against a party committed during the course of, and for seeking, redress of civil wrongs by way of administrative and judicial procedures relate back under the provisions of Fed. R. Civ. P. 15(c) to the date of the original pleading in order to bar the operation of the statute of limitations?

6. Should supplemental pleadings be allowed under the provisions of Fed. R. Civ. P. 15(d) when a party has been retaliated against by suspension from employment without pay, notice, statement of reasons, nor administrative hearing when he sought redress of his civil rights before the federal court of appeals?

The parties to the proceedings below are, Plaintiff-Appellant, JOHN N. PERRUZZA; Defendants-Appellees, COUNTY OF LOS ANGELES, CIVIL SERVICE COMMISSION OF LOS ANGELES COUNTY, LOS ANGELES COUNTY DEPARTMENT OF PERSONNEL, LOS ANGELES COUNTY OFF-

ICE OF THE DISTRICT ATTORNEY, OFFICE OF THE COUNTY COUNSEL OF LOS ANGELES COUNTY, ERNEST E. SANCHEZ, LOUISE L. FRANKEL, FRANK A. WORK, HARRY L. HUFFORD, MARTIN GOLDS, JOHN K. VAN DE KAMP, ANDREA ORDIN, JOHN H. LARSON, JOHN BASKETT, HALVOR S. MELOM, H. ANTHONY NICKLIN, JOE BEN HUDGENS.

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Opinions Below.....	1
Constitutional and Statutory Provisions Involved.....	1
Statement.....	6
The Questions are Substantial.....	19
Conclusion.....	28
Appendix A.....	1
Appendix B.....	10
Appendix C.....	30
Appendix D.....	31

TABLE OF AUTHORITIES

Cases

Atencio v. Board of Education, etc, 658 F. 2d 774 (10th Cir. 1981)..... 22

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)..... 18,22,26

Carey v. Piphus, 435 U.S. 247 (1978)..... 21

Childers v. Independent School

Dist., etc, 676 F. 2d 1338 (10th Cir. 1982)..... 27

City of Los Angeles v. Decker, 18 Cal. 3d 860 (1977) 28

Gibson v. Berryhill, 411 U.S. 564 (1973)..... 21

Muscare v. Quinn, 520 F. 2d 1212 (7th Cir. 1975)..... 25

Owens v. Rush, 654 F. 2d 1370 (10th Cir. 1981)....23,26

Winkler v. County of DeKalb, 540 F. Supp. 169 (U.S. Dist. Ct. N,D. Geo. 1981)..... 26

WKAT, Inc. v. F.C.C., 286 F. 2d 375 (D.C. Ct. App. 1961). 20

Constitution, statute and regulation:

United States Constitution:

First Amendment..... 2

42 U.S.C. 1983..... 2,12

42 U.S.C. 1985..... 3,12

Fed. R. Civ. P.....4,16,18,23,.24

Fed. R. Civ. P..... 5,17,25,.26

Miscellaneous:

Rule 7-108(B) Rules of Prof. Conduct, Calif. B&P Code 6067.. 19

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN N. PERRUZZA,

APPELLANT,

VS.

COUNTY OF LOS ANGELES, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR
THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Memorandum opinion of the court of appeals (App. A, infra, 1-9) is not officially reported under Ninth Circuit Rules of Court. The opinion of the district

court (App. B, 10-29) is not reported.

JURISDICTION

Memorandum decision of the Ninth Circuit Court of Appeals was entered on June 18, 1985. A notice of appeal was filed with the Ninth Circuit of Court of Appeals (App. C, 30-31) on July 3, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law... abridging freedom of speech..."

42 U.S.C. 1983 provides:

> "Civil action for deprivation of rights. Every person who, under color of any statutes, ordinance, regulation, custom, or usage, of any State or Terr-

itory or the District of Columbia, subjects, or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law..."

42 U.S.C. 1985 provides in pertinent part:

"Conspiracy to interfere with Civil Rights. (3) Depriving persons of rights and privileges. If two or more persons in any State or Territory conspire or go...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or equal privileges and immunities under the laws...in any case of conspiracy set

forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation..."

Federal Rule of Civil Procedure 15 (42 U.S.C. 1653) provides in pertinent part:

"(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading..."

"(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or event which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

STATEMENT

1. In September of 1975, Appellant John N. Perruzza, a Deputy District Attorney of Los Angeles County, protested a promotional examination, contending that it contained twenty wrong answers, and was granted a hearing before the Los Angeles County Civil Service Commission. The parties opposing Perruzza in these administrative hearings were members of the District Attorney's Office and the Department of Personnel. These opponents were represented by various members of the Los Angeles County Counsel's Office. During these hearings the same members of the Department of Personnel and of the County Counsel's Office also acted as advisors to this Commission when rulings by the Hearing Officers were contested by these same opponents. Commissioner Frank A. Work appointed himself the first hear-

ing officer in this matter. Commissioner Work was removed by Perruzza for bias and prejudice when it was pointed out that he not only sat as a hearing officer but would also sit as part of the Commission to review his own orders that Perruzza appealed. Professor William H. Dorsey Jr., Loyola University School of Law, was appointed as the hearing officer by the Commission. During discovery proceedings granted to Perruzza by Mr. Dorsey, it was revealed that the written grades and the promotional grades were being improperly altered by the District Attorney's Office and the Department of Personnel. In order to preclude further disclosures in this area the opposing members of the County Counsel's Office and the Department of Personnel resorted to unethical tactics by approaching the Commission ex parte and had rulings by Mr. Dorsey, which were

favorable to Perruzza, set aside.

Hearing officer Dorsey in his report entitled: "FINAL REPORT ON ISSUE OF BIAS AND PREJUDICE", dated July 7, 1977, concluded that the unethical ex parte conduct of the opposing parties and counsel with the Commission were of such proportions that neither he nor the Commission could give Perruzza a fair hearing. And all efforts were futile when he had ordered opposing parties and counsel to cease and desist in their unethical ex parte conduct and they refused. And their repeated refusal to produce even the simplest of documentary evidence by way of discovery denied Perruzza a fair hearing. The Commission, acting on advice of the County Counsel's Office, rejected Mr. Dorsey's findings and dismissed him.

The Commission, next hired retired Superior Court Judge Steven S. Weisman to

act as hearing officer. Judge Weisman ordered the court reporter to prepare a transcript of the Dorsey hearings. The reporter contended that his notes had been destroyed in a fire. A Los Angeles Fire Department Arson Investigation and an investigation conducted by a private insurance agent revealed that his notes had survived the fire. Appellant demanded that the District Attorney's Office investigate this alleged disappearance of the notes. The District Attorney refused to conduct an investigation. Judge Weisman found that the Commission had allowed opposing counsel to surreptitiously remove and destroy appellant's exhibits from the Dorsey hearings and he reprimanded both the Commission, and the County Counsel for their conduct in this matter. He also found that appellant had proven the unethical acts committed by opposing parties and counsel during the Dorsey hearings

and the Commission was obviously biased and prejudiced toward Perruzza and was deliberately denying him due process and the right to a fair and impartial hearing. Judge Weisman ordered that the Commission accept the findings of four independent law professors from Loyola, UCLA and USC Law Schools that Perruzza be given credit for his answers in the examination and should be promoted. The judge also found that the unethical ex parte conduct by opposing parties and counsel continued in the hearings before him. The Commission, again acting on the advice of County Counsel, rejected the judge's findings and fired him. In April of 1978, Mr. Dorsey and Judge Weisman appeared before the Los Angeles County Board of Supervisors and demanded that an investigation be conducted into the conduct of the Commission, opposing parties and counsel. No

action was taken. The Commission remanded appellant back for further hearings before another hearing officer. This latter officer was a personal friend of Commissioner Work and refused to remove himself when affidavits of bias and prejudice were filed by appellant. He terminated the hearings because the promotional list had expired due to the dilatory tactics of the Commission and opposing parties and counsel.

Perruzza then sought review of these administrative hearings by way of the proscribed Writ of Mandamus. The opposition successfully argued in the California trial and appellate courts that appellant could not prevail because he could not produce a transcript of the Dorsey hearings. The California Supreme Court sustained this decision on March 17, 1982.

2. Appellant filed a complaint in

federal court for violation of his civil rights by the members of the District Attorney's Office, Department of Personnel, County Counsel's Office and Civil Service Commission (who took part in the administrative hearings) under the provisions of 42 U.S.C. 1983. On November 4, 1981, the district court issued an "Order Granting Defendants' Motion to Dismiss With Leave to Amend", for appellant's failure to state a cause of action.

3. On December 6, 1982, appellant filed an amended complaint, under the provisions of 42 U.S.C. 1983, 1985(3), and 1986, alleging due process violations by the County and its agents to preclude appellant from having a fair and impartial hearing before an unbiased Commission. Appellant further alleged unlawful conspiracies by the County to not only deprive him of due process during the hearings

but also to preclude him from receiving judicial review by the courts of this denial of his basic rights. Said allegations were made by way of the operative facts set out in paragraph 1 of this section. Appellant further alleged in separate counts violation of his First Amendment rights of free speech by the County when it and its agents retaliated against him for seeking redress of these grievances by way of administrative hearings and judicial review of these acts. The operative facts alleged were: (1) appellant was transferred to the East Juvenile Facility requiring him to travel 40 miles further than his former employment; (2) the removal of appellant from his air-conditioned office into a former storage room which had no ventilation and in which the temperature ranged daily from 98 to 105 degrees; (3) this caused a breakdown in

June of 1979 of appellant's health, resulting in arrhythmia and hypertension; (4) which necessitated County doctors placing appellant in employment restrictions which precluded physical and mental stress and limited driving to and from work to 32 miles per day; (5) appellant was still incapacitated and was under constant medical treatment; (6) the District Attorney's Office would not let appellant transfer out of this situation that they had created unless appellant dropped his lawsuit; and (7) the County retaliated by giving appellant less than satisfactory promotional evaluations in order to prevent any future promotions, an act which was ongoing.

4. A motion to dismiss filed by the opposition remained under submission in the district court from March 7, 1983, to April 16, 1984, when an "Order Granting

Defendant's Motion to Dismiss" was issued. This order included the following points:

a. Appellant's allegations of procedural due process violations by the County and its agents during the civil service hearings are not constitutionally cognizable because he failed to show a property or liberty entitlement in his promotion. (App. B, 11-12, infra).

b. The court characterized appellant's first amendment claims of unlawful retaliation as being no more than an ongoing employment dispute not worthy of constitutionalization. (App. B, 12-16, 22-27, infra).

c. Appellant's claims of violation of his first amendment rights by unlawful retaliation are different causes of action from those originally filed and the three year statute of limitations is

not tolled, and the acts occurring prior to December 6, 1979 are barred. (App. B, 18-21, infra).

d. The court also found (in a Footnote) that appellant's first amendment claims did not relate back to the filing of the original complaint within the meaning of Fed. R. Civ. P. 15(c). (App. B, 28-29, infra).

5. Appellant on May 11, 1984, filed a Notice of Appeal with the District Court. On July 17, 1984, the court of appeals ordered appellant to file his brief. On August 10, 1984, appellees retaliated by assigning appellant to a trial court in violation of their own physician's orders. On August 17, 1984, appellant was suspended without notice, opportunity to respond nor a hearing, without pay from his employment. A "Petition for Instructions (Change of Circumstances)" was filed by

Appellant, under the provisions of Fed. R. Civ. P. 15(d), seeking leave to file a supplemental pleading. (App. D, 32-36). Prior to argument appellant furnished the court of appeals with the "FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION", in appellants favor, filed by Hearing Officer SARA ADLER on January 11, 1985, with the Commission. (App. D, 36, footnote).

This matter was argued and submitted to the court of appeals on February 8, 1985, and a "Memorandum" decision was filed on June 18, 1985. (App. A, 1-9). The appellate court ruled that:

(a) Appellant failed to allege the threatened deprivation of any property or liberty interest by the irregular and arguably unfair Civil Service hearing. (App. A, 3-5).

(b) Irregular and inadequate conduct of Civil Service hearings and proce-

dures do not, of themselves, create a property interest of the threatened deprivation thereof. The court cited Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), as controlling. (App. A, 5).

(c) Perruzza's retaliation claims arose from a separate core of operative facts and cannot relate back to bar the operation of the statute of limitations under the privisions of Fed. R. Civ. P. 15(c). (App. A, 6-8).

(d) The statute of limitations is not tolled because Perruzza's First Amendment claims were not litigated in the state courts nor were they subject to Civil Service administrative procedures. (App. A, 8).

(e) Appellant's contention raised on appeal that the statute has not begun to run because of an on-going conspiracy is not supported by the complaint.

(App. A, Footnote, 8-9).

(f) The downgrading of appellant's job evaluation is little more than an on-going job dispute which does not merit constitutional protection. (App.A 8-9).

THE QUESTIONS ARE SUBSTANTIAL

1. Nowhere, in either the state or federal courts did the appellees ever contest or controvert the fact that they acted in a totally unethical manner[1] in obtaining ex parte orders from the Commission during the administrative hearings. Yet, instead of outrage at this conduct, the district court and the court of appeals granted deference to appellees and the administrative decisions and sought ways to prevent appellant from proceeding

[1] "A member of the State Bar shall not directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer..."

with his litigation. When faced with a similiar situation another court of appeal ruled that those who engaged in unethical ex parte conduct in order to further their cause in administrative hearings are corrupters of the judicial process and have no standing in a court of law...and were fortunate that the only thing they lost was their cause of action in court. WKAT, Inc., v. F.C.C., 286 F. 2d 375, 383 (D.C. Ct. App. 1961). With this decision in mind the lowere courts should have allowed appellant to proceed with his litigation, and, even entertained summary judgment on his behalf.

2. The deprivation of procedural due process by unethical ex parte means from a biased and prejudiced administrative process is of monumental constitutional import. This Court recognized that there

---

Rule 7 - 108(B), Rules of Professional Conduct, California Business and Professions Code, Sect. 6067.

was a constitutional denial of due process when an individual had to subject himself to an administrative hearing before a biased and prejudiced board that had prejudged his case. Gibson v. Berryhill, 411 U.S. 564 (1973). And, further, this Court stated in Carey v. Piphus, 435 U.S. 247, 267 (1978):

> "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merit 's of claimant's substantive assertions, and because of the importance to organized society that procedural process be observed...(citations omitted) ...we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury."

Perruzza urges that in view of the outrageous unethical ex parte procedures the appellees used to deny him due process in the civil service hearings, he has shown substantial injury and a substantial constitutional issue which should litigated in the courts below.

3. Both the trial court and the appellate courts ruled that denial of due process by the irregular and inadequate conduct of civil service hearings, even by unethical ex parte means, do not, of themselves, create a property interest worthy of constitutional recognition. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), is cited as controlling. The courts' reliance on Roth is misguided. That decision never addressed itself to the issue: "Once given an administrative hearing, does an individual have a constitutional right to procedural due process in that hearing?" Every court faced with that issue has ruled, yes. In, Atencio v. Board of Education, etc, 658 F. 2d 774, 779 (10th Cir. 1981), it was recognized that a federal constitutional violation existed when an employee is denied a fair forum and state

rights in an administrative proceeding. In view of appellees intense unethical ex parte misconduct it demeans and debases our entire concept of due process and fairness to allow appellees to prevail.

4. When appellant sought redress of his wrongs through administrative and state judicial procedures, appellees retaliated against him. Their conduct was a simple reaction to appellant's exercise of his constitutional rights. Yet, in view of this cause and affect the appellate court could not find conduct, transactions or occurrences which arose out of the original pleadiings to allow a relation back under the provisions of Fed. R. Civ. P. 15(c). The court below conceded that there may be a First Amendment violation for retaliation only under the facts of Owens v. Rush, 654 F. 2d 1370, 1379 (10th Cir. 1981). It appears that retal-

iation in defense of another's civil rights is protected, however, it is less of a right to protect one's own civil rights through the judicial process. The line appears to have been shabbily drawn in order to preclude appellant from prevailing in the courts below. Appellant has shown the validity of applying Fed. R. Civ. P. 15(c) to this First Amendment claims, and the bar of the statute of limitaions does not apply.

5. Appellees, in a continuing course of misconduct, retaliated against appellant when he sought review in the court of appeals. Appellant was deliberately assigned to a position which would jeopardize his health. And, then, on August 17, 1984, he was suspended without pay, without the benefit of notice, statement of reasons, nor a hearing. Appellant petitioned the court of appeals by way of a

"Petition for Instructions (Change of Circumstances)", requesting the right to file supplemental pleadings under the provisions of Fed. R. Civ. P. 15(d). Although it was now obvious that appellees had cured any bar of the statute of limitations and inability to state a property interest by appellant, the court never addressed itself to the petition. In, Muscare v. Quinn, 520 F. 2d 1212, 1215, (7th Cir. 1975), cert. dnd. 452 U.S. 560 (1976) it was stated:

> "Public emplcyees facing temporary suspension for less than 30 days have interests qualifying for protection under the due process clause, and due process requires at the minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency."

Appellant was suspended for four months without pay in violation of Muscare and was not reinstated until a new civil service hearing found that appellees violated

appellant's medical restrictions for no legitimate reason, unlawfully suspended him without pay and discriminated against him because of his medical condition. To date, appellees have not sought reversal of this decision through the proper judicial procedures. It is now res judicata. The property requirements of Roth, supra, and the job termination requirements of Owens, supra, have now been met. Appellees in the courts below are primarily attorneys, fully cognizant, of the law and the consequences of these continuing acts of retaliation. There is no reason under the provisions of Fed. R. Civ. P. 15(d) that appellant should be precluded from filing supplemental pleadings in order to clear any alleged defects in the original pleadings. The decisions of Winkler v. County of DeKalb, 540 F. Supp. 169 (U.S. Dist. Ct. N.D. Geo. 1981) and

Childers v. Independent School District No. 1 of Bryan County, State of Oklahoma, 676 F. 2d 1338 (10th Cir. 1982), allowed the filing of supplemental pleadings after dismissal of the original pleadings for failure to state a cause of action for violation of civil rights. These were base upon termination of plaintiffs' employment after they had sought redress of their civil rights in the federal courts. A situation paralleling appellants. In view of these continuing acts of retaliation this matter should have been referred back to the district court for the filing of supplemental pleadings.

None of courts below addressed the critical issue of the gross abuse of political position and power by opposing counsel and the arrogance of their treatment of appellant's constitutional rights. The reluctance of the lower court to act only

encouraged them to commit further acts of retaliation. Citing both the Rules of Professional Conduct of the State Bar of California and the American Bar Association Code of Professional Responsibility, the California Supreme Court held that government lawyers owe a duty of:

> "A government lawyer in a civil action...has the responsibility to seek justice and to develop a full and fair record, and he should not use his position to harass parties or to bring about unjust settlements or results." City of Los Angeles v. Decker, 18 Cal. 3d 860, 871 (1977).

Appellees' conduct has been the antithesis of this mandate and totally repugnant to our concepts of due process, fair and impartial hearings, before an unbiased trier of facts.

CONCLUSION

The Writ should be granted and jurisdiction assumed.

Respectfully submitted,

JOHN N. PERRUZZA
Attorney at Law
In Pro Se

APPENDIX A

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

JOHN N. PERRUZZA, Plaintiff-Appellant, v. COUNTY OF LOS ANGELES, et al., Defendants-Appellees. No. 84-5907, D.C. No. CV 81-3544-WMB. Filed June 18, 1985.

MEMORANDUM

Argued and Submitted: February 8, 1985.

JOHN N. PERRUZZA, In Pro Se, and PAUL CARUSO, Associate Counsel for JOHN N. PERRUZZA. DE WITT W. CLINTON, County Counsel, by MARTHA A. TORGOW, Deputy County Counsel, for LOS ANGELES COUNTY, et al.

BEFORE: SCHROEDER, FLETCHER, and FARRIS, Circuit Judges.

Appellant, John N. Perruzza, challenges the fairness of a hearing accorded him by the County of Los Angeles alleging that he was denied due process. Perruzza also claims that alleged retaliatory acts taken

by the County after he challenged a promotional exam violated his first amendment rights. The district court dismissed Perruzza's § 1983 action because he had failed to allege a liberty or property interest sufficient to implicate federal due process concerns, that the majority of his first amendment retaliation claims were barred by the statute of limitations, and that his remaining claim of retaliation did not rise to the level of a constitutional violation. We affirm.

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12 (b)(6) is a ruling on a question of law and therefore reviewable de novo. North Star International v. Arizona Corporation Commission, 720 F. 2d 578, 580 (9th Cir. 1983). The review is limited to the contents of the complaint. Id., at 581. For a dismissal to be proper it

must appear with certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven. Halet v. Wend Investment Co., 672 F. 2d 1305, 1309 (9th Cir. 1982).

Due Process Claim

The appellant alleged only that the Civil Service Commission, after granting him a fair hearing, failed to give him a fair hearing as required by the due process clause. The appellant alleged no underlying property or liberty interest but instead argues that, once a hearing is granted, that hearing must be conducted within federal due process guidelines and there is no longer any need for a liberty or property interest for due process requirements to attach.

The Fourteenth Amendment prohibits the deprivation of liberty or property without due process of law. For this federal

due process clause to be triggered there must be a liberty or property interest at stake in the challenged governmental actions. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). In the context of regulations granting a hearing before prisoner transfer, the Supreme Court held that, absent an underlying substantive right, there is no significance to the fact that state regulations require a particular kind of hearing. Olim v. Wakinekona, 461 U.S. 238, 249-50 (1983). The Court went on to state that process is not an end in itself, rather it must protect a substantive interest to which the individual has a legitimate claim to entitlement. Id. at 1748. Moreover, the Court held that a

> "...(s)tate may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the state does not create an independent substant-

ive right."

Id. at 250-51.

Perruzza has failed in both his original and amended complaints to allege the threatened deprivation of any property or liberty interest by the irregular and arguably unfair Civil Service hearing. That Civil Service hearings and procedures existed, or that there was an irregular and inadequate conduct of those procedures do not, of themselves, create a property interest or the threatened deprivation thereof. Therefore, without the allegation of a liberty or property interest, there is no set of facts that would substantiate the due process claims, and the dismissal was proper.[1]

---

[1] In Roth, supra, the Supreme Court stated that to have a protected property right in a benefit a person must demonstrate a legitimate claim or entitlement to that benefir as defined by state law. 408 U.S. at 576-77. State procedural requirements could create a protected interest if the

First Amendment Retaliation Claims

The district court dismissed the bulk of Perruzza's retaliation claims because they were barred by the statute of limitations. Perruzza alleged the violation of his First Amendment rights for the first time in his second amended complaint. The applicable statute of limitations period for § 1983 actions in California is three years. Bradshaw v. Zoological Society of San Diego, 569 F. 2d 1066, 1068 (9th Cir. 1978). The second amended complaint was filed over three years after all

---

procedures are intended to be a significant substantive restriction on decision-making, thereby creating a legitimate expectation that if certain requirements are met the benefit will be obtained. See Goodisman v. Lytle. 724 F. 2d 818, 820 (9th Cir. 1984).

Perruzza has alleged no assurance or guarantee that he would be promoted, or that if he met certain objective criteria he would be promoted. By failing to allege any entitlement to promotion Perruzza has failed to allege a cognizable liberty or property interest. Perruzza's possible interest in fair grading procedures is

retaliatory events claimed except an alleged continuing downgrading of Perruzza's job performance evaluations. The statute of limitations would therefore bar all but this last claim unless Perruzza could establish an exception to the statute's running.

Perruzza first claims that the statute has not run because his retaliation claim should relate back to his original filing under Fed. R. Civ. P. 15(c). Rule 15(c) allows relations back of a new theory in an amended complaint if the theory involves the same transactions, occurrence, or core of operative facts involved in the original claim. The original arises from procedural irregularities in the hearing accorded to Perruzza. His claims of ret-

---

only a procedural and not a substantive restriction on the district attorney's discretionary decision and, as such, similarly fails to create a sufficient property interest.

aliation arise from separable events that took place after he brought his appeal in the state courts and were not the subject of his state court actions. Because Perruzza's retaliation claims arose from a separate core of operative facts those claims cannot relate back.

Perruzza also argues that the statute should not be tolled while he pursued his claims in state administrative procedures and appealed the administrative rulings. See Campbell v. Graham-Armstrong, 9 Cal. 3d 482, 490, 107 Cal. Rptr. 777 (1973). Yet, again, Perruzza 's First Amendment claim was not litigated in the state courts not was it the subject of state Civil Service administrative procedures. Perruzza's claim cannot survive of this theory and therefore all but the alleged continuing downgrading of his job evaluation are time barred.[2]

Perruzza's remaining retaliation claim does not warrant reversal of the district court's dismissal. Perruzza was not litigating or trying to vindicate any civil right, rather he was seeking redress in a job dispute using civil service and state appellate procedures designed for that purpose. Moreover, the alleged on-going marking down of job performance evaluation casts Perruzza's claim as little more than an on-going job dispute which we conclude does not merit constitutional protection.

The judgment of the district court is, therefore,

AFFIRMED.

---

[2] Perruzza's further contention, raised for the first time on appeal, that the statute has not begun to run because he is a victim of on-going conspiracy is also not supported by his complaint.

APPENDIX B

APPENDIX B.

OPINION OF THE UNITED STATES COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN N. PERRUZZA, Plaintiff, v. COUNTY OF LOS ANGELES, et al., Defendants.

No. CV 81-3544-WMB.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS.

Filed April 16, 1984.

JOHN N. PERRUZZA, In Pro Se, Plaintiff, and for Defendants, JOHN H. LARSON, County Counsel, by WILLIAM F. STEWART.

Los Angeles County Deputy District Attnorey John N. Perruzza brings this action against Los Angeles County, the Los Angeles District Attorney's Office, the Los Angeles County Counsel, Los Angeles Civil Service Commission and various county officals under 42 U.S.C. § 1983 (1976) alleging violations of due process in civil service promotion procedures and administrative

and judicial challenges to those procedures. Plaintiff also alleges that defendants retaliated against him for his challenge to the promotion procedures, thus violating his first amendment rights.

Defendants now move to dismiss the first amended complaint. The Court grants the motion as to the due process claims on the ground that plaintiff has failed to allege a constitutionally protected liberty or property interest upon which such claims may rest. The Court grants the motion as to the first amendment claims on the ground that, to the extent they survive the applicable statute of limitations, the actions complained of do not constitute a constitutional violation.

I. DUE PROCESS CLAIMS

Plaintiff's due process claims center on plaintiff's attempts to gain a promotion from Attorney Grade III to Grade IV

in county civil service. As in his original pleading, plaintiff in his first amended complaint alleges a host of procedural irregularities in connection with his attempts to gain promotion under the county civil service system, but neglects to allege a property or liberty entitlement which would make these irregularities constitutionally cognizable. E.g., Board of Regents v. Roth, 408 U.S. 564 (1972). The Court previously dismissed the plaintiff's original complaint on this ground. Because Plaintiff has not cured this basic defect, plaintiff does not state valid claims for violation of due process. Therefore, for the same reasons set out in the Court's previous order, the Court grants, without, leave to amend, defendants' motion to dismiss the due process claims, Counts I-IV of the first amended complaint.

II. FIRST AMENDMENT CLAIMS

Plaintiff, in his first amended complaint, adds two new claims for violation of the first amendment. Plaintiff alleges:

> The Defendants, Office of the District Attorney, John K. Van de Kamp, and the County of Los Angeles, along with members of the administration of the District Attorney's Office retaliated against the Plaintiff because he had excerised his right of free speech and his right to seek redress through the courts as protected by the laws and Constitution of the United States.

First Amended Complaint, p. 17, par. 14.

Plaintiff alleges that in September of 1976, the District Attorney's Office retaliated against him for his civil service challenge by transferring him to the office's East Juvenile Facility. As a result, plaintiff was forced to drive an extra 40 miles a day. Plaintiff states that "by way of further retaliation," defendants

removed plaintiff from his air conditioned office to a former storage room where the temperature varied from "98 degrees to 105 degrees Fahrenheit, and caused Plaintiff to become phyiscally ill." First Amended Complaint, p. 17-18, par. 15. Plaintiff contends that although he had always received personnel and promotional evaluations of outstanding before initiating his civil service proceedings, thereafter, his evaluations were lowered to less than satisfactory. Plaintiff alleges that this lowering of evaluations, which continues through the present, was done by defendants both to eliminate his chances of promotion and to retaliate against him for his pursuit of administrative and judicial redress. First Amended Complaint, p. 18, par. 16. Plaintiff finally alleges that on January 22, 1979, the Chief Deputy District Attorney "informed the Plaintiff that the

administration of the District Attorney's Office would not allow his transfer to the Santa Monica Office unless he dropped his lawsuit." First Amended Complaint, p. 13, par. 38. This occurred while plaintiff was appearing his adverse civil service commission decision to the Superior Court.

Although plaintiff also alleges violation of free speech rights, the factual allegations of the complaint relate only to a claim for violation of plaintiff's right of petition for redress. The Court, therefore, will consider the claims solely for violation of petition rights.

Defendants seek dismissal on five grounds: (1) that plaintiff's claims are barred by the doctrines of collateral estoppel and res judicata; (2) the claims are barred by plaintiff's lack of a property interest in the promotion he seeks; (3) that defendants' conduct is immunized under the doctrine of prosecutroial immunity;

and (5) that plaintiff has not stated a claim under the first amendment.

A. Collateral Estoppel/Res Judicata

Defendants argue that the decision of the California Court of Appeal in Breault v. County of Los Angeles, 2d Civil No. 60527, which devided plaintiff's civil service appeal against him, should bar the present action under collateral estoppel and res judicata. Defendants urge that as to those matters actually litigated, collateral estoppel would apply. Allen v. McCurry, 449 U.S. 90 (1980). Defendants argue, that, as to those matters plaintiff could have raised in his civil service proceedings and appeal, res judicata applies. Lee v. City of Peoria, 685 F. 2d 196 (7th Cir. 1982).

Neither party argues that plaintiff's retaliation claims were actually litigated as part of his state case. Therefore, they cannot be barred by collateral estoppel.

Nor does res judicata apply. One of the elements of res judicata is that the cause of action sued upon in the original case be identical to that sued upon in the action sought to be barred. Costantini v. Trans World Airlines, 681 F. 2d 1199, 1201 (9th Cir.), cert. denied, 103 S. Ct. 570 (1982). In determining whether successive lawsuits rest upon the same cause of action, courts look to several factors, including the nature of the rights sued upon, the evidence presented and, most importantly, "whether the two suits arise out of the same transactional nucleus of facts." Id., quoting Harris v. Jacobs, 621 F. 2d 341, 343 (9th Cir. 1980). Plaintiff's retaliation claims rest upon rights under the civil service system. The evidence relevant to retaliation claims does not appear to have been part of the earlies proceedings and the "transactional nucleus of facts" is quite different. The retal-

iation claims stand or fall independently of plaintiff's procedural claims. The Court finds that neither res judicata nor collateral estoppel bars plaintiff's retaliation claims.

B. Lack of Property Interest

Although the plaintiff's failure to allege a property interest in his potential promotion is fatal to his due process claims, it is irrelevant to a claim under the first amendment. Owens v. Rush, 654 F. 2d 1370, 1379 (10th Cir. 1981), citing Board of Regents v. Roth, 408 U.S. 564, 569 (1972) and Perry v. Sindermann, 408 U.S. 593, 599 (1972). Thus, plaintiff's retaliation claims may not be dismissed on this ground.

C. Statute of Limitations

Defendants correctly point out that the statute of limitations for actions brought under section 1983 is determined by state

law and that California law provides an applicable statute of limitations of three years. Bradshaw v. Zoological Society of San Diego, 569 F. 2d 1066, 1068 (9th Cir. 1978). Plaintiff first asserted his retaliation claims in the first amended complaint filed December 6, 1982. Thus, claims based on acts occurring prior to December 6, 1979 - including defendants' 1976 transfer of plaintiff to the East Juvenile Facility and their January 22, 1979 denial of his requested transfer to the Santa Monica office - are time barred unless the statute of limitations is tolled.

Plaintiff argues that the statute should be tolled for the period in which he pursued administrative and the judicial remedies in connection with his promotion attempt. Campbell v. Graham-Armstrong, 9 Cal. 3d 482, 490, 107 Cal. Rptr. 777, 509 P. 2d 689 (1973) (tolling of statute

for exhaustion of administrative remedies); Nichols v. Canoga Industries, 83 Cal. App. 3d 956, 962, 148 Cal. Rptr. 459 (1978) (equitable tolling of statute while plaintiff "reasonably, and in good faith, and without prejudice to his adversary pursues an alternative remedy...").

These tolling principles, by their own terms, only apply if the claim pursued through administrative proceedings, and their judicial appeal, is the same as that later sued upon in an independent legal action. As previously noted, plaintiff's retaliation claims were not asserted in any prior action and are sufficienty unrelated to those that were asserted as to escape the the bar of res judicata. Having already found that the retaliation claims constitute a different cause of action than the procedural claims previously pursued in state proceedings, the Court now

finds that the retaliation claims also represent a different cause of action for the purposes of the statute of limitations. The applicable three-year statute of limitations is not tolled and the claims based on acts occurring prior to December 6, 1979 are barred.[1] The only acts of which plaintiff complains which survive the statute of limitations are the actions of the District Attorney's Office in lowering plaintiff's work evaluations during the period from December 6, 1979 through the present.

D. Prosecutorial Immunity

Defendants assert that all individual defendants are immune from liability here under Butz v. Economou, 438 U.S. 478, (1978). The availability of prosecutorial immunity depends upon the nature of the acts of which plaintiff complains. The only acts now before the Court are those

of members of the District Attorney's Office who, allegedly, lowered the work evaluations of plaintiff. In so doing, the defendant prosecutors were neither exercising quasi-prosecutorial functions in a quasi-judicial proceedings as was the case in Butz, 438 U.S. at 512-15, nor were they engaged in the actual prosecution of criminal cases in the judicial system. See Imbler v. Pachtman, 424 U.S. 409, 430 (1976). The defendant prosecutors were acting as employers, pure and simple, and the Supreme Court has not extended immunity to prosecutors in this administrative role. Prosecutorial immunity is not available as a defense.

E. Merits of the Remaining Retaliation Claim

The Court finally must decide whether the lowering of work evaluations by state officers, in retaliation for a state emp-

loyee's pursuit of administrative and judicial remedies, constitutes a violation of the first amendment. The lone case plaintiff cites in support of his retaliation claim is Owens v. Rush, 654 F. 2d 1370 (10th Cir. 1981). In Owens, the Tenth Circuit found that plaintiff stated a valid first amendment claim when he alleged he was fired from his job as undersheriff in retaliation for helping his wife file a sex discrimination claim with the Equal Employment Opportunity Commission against plaintiff's employer, the sheriff's department. The court found that plaintiff's aid of his wife came within the protection of the first amendment as activity "'assisting' litigation vindicating civil rights." Owens at 1379, citing NAACP v. Button, 371 U.S. 415 (1963).

For its legal support, the Owens court

relied on a line of Supreme Court cases which may be distinguished here. In NAACP v. Button, supra, the Supreme Court struck down a state statute which prevented much civil rights litigation. The Court recognized that litigation could be a form of political expression and, thus, should be protected under the first amendment. The Court held:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country. It is thus a form of political expression.

Id. at 429. See also In re Primus, 436 U.S. 412 (1978) (civil rights organization's solicitation of plaintiffs to chall-

enge sterilization of women as precondition for Medicaid protected under first amendment).

Following Button, the Supreme Court also recognized that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment," whether the contemplated litigation is explicityly political or not. United Transportation Union v. Michigan Bar, 401 U.S. 576, 585 (1971) (emphasis added). See also Railroad Trainmen v. Virginia Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois Bar Assn., 389 U.S. 217 (1967).

Plaintiff's action is, by nature, neither political in its goals nor collective in its undertaking. It is, by nature, an individual employee's job dispute with his employer.

Owens v Rush is also distinguishable from the present action on its own terms,

First, in Owens, the underlying claim which prompted the retaliation was for violation of civil rights; here plaintiff's underlying claim was for violation of civil service procedures. As discussed above, those do not rise to the level of constitutional violations. Second, in Owens, the retaliation took the form of job termination; here, the only retaliation before the Court is downgraded job evaluations. The Court recognizes that these distinctions are as much matters of degree as of kind, but in uncharted constitutional waters such as these, even matters of degree must be seriously considered. In other contexts, the Supreme Court has recognized the dangers of constitutionalizing state civil wrongs. Parratt v. Taylor, 451 U.S. 527, 544 (1981); See Baker v. McCollan, 443 U.S. 137, 144-45 (1979) (more than mere false imprision-

ment required to state constitutional violation); Paul v. Davis, 424 U.S. 693, 713-14 (1976) (more than defamation required for constitutional violation); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (more than medical malpractice required for eighth amendment violation). In the absence of case authority directing a contrary result, the Court declines to constitutionalize this sort of ongoing employment dispute.

The Court finds that defendants' alleged downgrading of plaintiff's work evaluations in retaliation for plaintiff's pursuit of administrative and judicial remedies in furtherance of his civil service challenge does not constitute a violation of the first amendment.

Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that defendants' motion to dismiss is GRANTED.

DATED: April 16, 1984

WM. MATTHEW BYRNE, Jr.
United States
District Judge

Footnote No. 1 Reference Page 6

Although none of the parties raise it, the Court recognizes a possible argument that the first amendment claims relate back to the due process claims asserted in the original complaint filed July 16, 1981. Fed. R. Civ. P. 15(c). If so, acts prior to July 16, 1978 would be time-barred. The only additional act this would present to the Court is the alleged refusal of defendants in 1979 to grant plaintiff a transfer to the Santa Monica office unless he dropper his lawsuit.

The Court need not decide whether this additional allegation would change the result here because it does not appear that the first amendment claims "arose out of the conduct, transaction or occurence set forth or attempted to be set forth in the original pleading..." Fed. R. Civ. P. 15(c). Although the retaliation and due process claims bear some relationship to each other, the facts relevant to each are substantially different. Nor does the Court find that the original filing of the due process claims gave defendants notice of possible retaliation claims. See Rural Fire Protection Co. v. Hepp, 366 F. 2d 355, 362 (9th Cir. 1966); De Malherbe v. International Union of Elevator Constructors, 449 F. Supp. 1335, 1353

(N.D. Cal. 1978). The Court finds that plaintiff's first amendment claims do not relate back to the filing of the original complaint.

APPENDIX C

APPENDIX C.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN N. PERRUZZA, Plaintiff, v. COUNTY OF LOS ANGELES, et al., Defendants.

NO. 84-5907 (Civil) D.C. NO. CV 81-3544-WMB.

NOTICE OF APPEAL

Filed July 3, 1985

JOHN N. PERRUZZA, In Pro Se

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JOHN N. PERRUZZA, Plaintiff-Appellant, hereby appeals to the Supreme Court of the United States from the judgment entered in this action on June 18, 1985.

This appeal is taken pursuant to 28 U.S.C. 1254.

JOHN N. PERRUZZA
Attorney at Law

APPENDIX D

APPENDIX D.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN N. PERRUZZA, Plaintiff-Appellant, vs. COUNTY OF LOS ANGELES, et al., Defendants. NO. 84-5907

PETITION FOR INSTRUCTIONS (CHANGE OF CIRCUMSTANCES).

Filed October 2, 1985.

JOHN N. PERRUZZA, In Pro Per, PAUL CARUSO, Associate Counsel.

Appellant John Perruzza respectfully informs this Court of a change of circumstances between the parties during the pendency of this appeal, and further respectfully petitions this Court for instructions in light of these changes and the possible application of F.R.C.P. 15(d). The alleged defects in any of Appellant's pleadings below have been cured by Appellees' subsequent actions.

During the preparation of this appeal, on August 10, 1984, Appellees (The County) retaliated further against Appellant /* (Perruzza) by transferring him to a trial court in the Van Nuys branch of the District Attorney's offices. That transfer was in direct violation of the medical restrictions placed on him by Dr. S. Fisher, Occupational Health Service, Department of Personnel, County of Los Angeles, on June 12, 1979, because of his arrhythmia and hypertension. Those restrictions were still in force and Perruzza submits that this attempt by the County to jeopardize his health was made in order to intimidate him into foregoing this appeal.

By way of further intimidation to forego this appeal, on August 17, 1984, the County violated Perruzza's rights of due process by suspending him from employment

without pay. This suspension is in violation of both Civil Service Regulations and California law. He was given no reason nor right to respond.

Because of these further unprecedented acts of retaliation against Appellant Perruzza by the County, which Perruzza submits are part of the ongoing effort to dissuade him from his appeal, he respectfully petitions this Court for instructions on how to proceed, particularly in light of F.R.C.P. 15(d) which provides:

> Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original

> pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. F.R.C.P. 15(d)

Two relatively recent cases indicate that this matter must now be remanded to the trial court to enable Appellant Perruzza to plead this new change in circumstances which obviously cures any alleged statute of limitations or Board of Regents of State Colleges v. Roth 408 U.S. 564 (1972) deficiencies raised by the court below.

The right of employees to file amended complaints when they are terminated after their complaints for violations of civil rights (demotion/change of duties) have been dismissed is upheld in the decisions of Winkler v. County of DeKalb, 540 F.

Supp. 169 (U.S. Dist. Ct. N.D. Geo. 1981) and Childers v. Independent School District No. 1 of Bryan County, State of Oklahoma 676 F. 2d 1338 (10th Cir. 1982).

PETITION FOR INSTRUCTIONS

Appellant respectfully seeks this Court's instructions regarding whether to proceed with this appeal or to seek immediate remand to the Trial Court to file an amended complaint alleging these violations.

ATTORNEYS FEES & COSTS

Appellant submits that these continued unprecedented acts of retaliation by Appellees to have this case suppressed and to deprieve him of both the rights of due process and free speech, justify this Court awarding Appellant his costs and attorney's fees in this matter.

Dated: Oct. 1, 1984 Respectfully submitted,

JOHN N. PERRUZZA, In Pro Per

PAUL CARUSO, Associate Counsel

/* Appellant, Perruzza, petitioned the County of Los Angeles Civil Service Commission for review of these actions and his petition was granted on Oct. 17, 1984.

On January 11, 1985, Hearing Officer, SARA ADLER, submitted her "FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION", to this Commission. She found: **

"Appellant was suspended unlawfully without pay for four months,

The actions of the Respondent were so arbitrary and capricious as to this Appellant as to amount to discrimination based on medical condition.

The forced medical leave was a de facto suspension."

The evidence presented at the hearing showed that Appellant was suspended without notice or reasons given, without an opportunity to respond and without a hearing before the de facto suspension.

On April 24, 1985, this newly formed Commission adopted the hearing officer's findings of facts and recommendation as its final decision in a 5 to 0 vote. To date the Respondent has not appealed this order within the statutory period.

** This "FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION" was not set forth in its entirety in order to comply with Rules 15 & 33 as to page limitations.